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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 UNITED STATES OF AMERICA,

4 v.

23 Cr. 430 (KPF)

5 ROMAN STORM,

6 Decision

7 Defendant.

8 -----x

9 New York, N.Y.
10 September 26, 2024
4:30 p.m.

11 Before:

12 HON. KATHERINE POLK FAILLA,

13 District Judge

14 APPEARANCES

15 DAMIAN WILLIAMS

16 United States Attorney for the
Southern District of New York

17 BY: NATHAN M. REHN

BEN ARAD

BENJAMIN A. GIANFORTI

18 Assistant United States Attorneys

19 KEVIN G. MOSLEY

20 Special Assistant United States Attorney

21 WAYMAKER LLP

Attorneys for Defendant

22 BY: BRIAN E. KLEIN

KEVIN M. CASEY

23 KERI C. AXEL

24 HECKER FINK LLP

Attorney for Defendant

25 BY: DAVID E. PATTON

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(Case called)

MR. REHN: Good afternoon, your Honor.

This is Thane Rehn for the government. Also on the line are Ben Gianforti and Ben Arad, Assistant United States Attorneys, and Special Assistant United States Attorney Kevin Mosley.

THE COURT: Good afternoon to everyone, and thank you. And representing Mr. Storm this afternoon?

SPEAKER2: Good afternoon, your Honor.

This is Brian Klein on the line, also my colleagues Keri Curtis Axel and Kevin Casey, and then David Patton, and our client is also dialed in, Mr. Storm.

THE COURT: Thank you very much.

Good afternoon to each counsel.

Mr. Storm, this is Judge Failla. Are you able to hear me, sir?

THE DEFENDANT: Yes, your Honor, I'm able to hear you. This is Roman Storm.

THE COURT: Thank you very much.

Mr. Klein, I thought that, given that this was going to be a lengthy oral decision, it might make sense for the parties to appear telephonically. I also thought that might be a convenience to you and to your client, but of course I would like to obtain, if I may, your client's waiver of having this proceeding take place in person.

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1 SPEAKER2: Your Honor, yes, you have that. And we
2 greatly appreciate you letting us do this over phone. Do you
3 need him to agree over the phone?

4 THE COURT: I would, thank you. And you'll excuse me,
5 there was an interruption a moment there. Hopefully there
6 won't be multiple interruptions during this conference.

7 Mr. Storm, were you able to hear me just speaking with
8 your counsel a moment ago?

9 THE DEFENDANT: Yes, I did. And I do agree to
10 proceed. Thank you.

11 THE COURT: By that, you mean you agree to proceed
12 telephonically, and I thank you for noting that.

13 THE DEFENDANT: Right.

14 THE COURT: Well, then let me give folks an idea of
15 the afternoon's proceedings. I have a long oral decision to
16 read into the record, and at times like this, I think that I
17 probably should issue it in writing, but it would get to you
18 much more quickly if I did it orally, and that's why I'm doing
19 it this way.

20 I am going to give everyone a moment or two to mute
21 themselves so that there aren't any interruptions as I give
22 this. And just for your planning purposes, I did not time
23 myself, but I imagine that this is a 45- to 60-minute decision,
24 so I appreciate in advance all of the patience and the
25 attention that you can give me. So I'll pause for a moment and

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1 then I will begin.

2 I do begin by thanking everyone on the call, in
3 particular counsel for both sides and Mr. Storm for your
4 comprehensive submissions, which took me a while to get
5 through, and of course your oral argument presentations, but
6 also your patience. Right after the oral argument in this
7 matter, I found out that I had very time-sensitive issues in
8 two other cases that I have with classified components to them,
9 and I've also spent most of the month of September on trial.
10 My trial finished this past Monday, so I thank for you your
11 patience.

12 I also thank those who might be listening to this call
13 or who will see the transcript of this who submitted *amici*
14 *curiae* briefs to aid me in considering the issues in this case.

15 After the oral argument in August, I was advised by
16 the parties that they had resolved the issues regarding the
17 motion to suppress. I won't be discussing it here; instead,
18 I'll be dealing with the motion to compel and the motion to
19 dismiss. And for the reasons that I'm about to outline, I'm
20 denying both motions.

21 I will ask the parties to obtain a copy of this
22 transcript whenever it's convenient for you.

23 I'm going to begin with the motion to compel. And
24 Mr. Storm is moving the Court for an order compelling the
25 government to produce basically two categories of information.

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1 I'll refer to the first category as "MLAT" communications, and
2 I know the parties know what I'm speaking of. And at the time
3 of the oral argument, what I had understood was that Mr. Storm
4 had received some portion of the materials that the government
5 had received in response to MLAT requests but not the other
6 line communications with, for example, the Dutch authorities.

7 I also did appreciate Mr. Klein's proviso that the
8 defense didn't want nonsubstantive communications like
9 transmittal letters or scheduling emails, so nothing of that
10 nature.

11 There's also the second category, which would be
12 communications with or involving the office of Foreign Assets
13 Control, which I will refer to as "OFAC," and the Financial
14 Crimes Enforcement Network, which I will refer to as "FinCEN,"
15 materials and communications regarding Mr. Storm or this case.
16 And Mr. Storm argued that the government was required to
17 produce this information in accordance with their obligations
18 under Federal Rule of Criminal Procedure 16 and cases such as
19 *Brady v. Maryland*, 373 U.S. 83, from 1963. He argued that the
20 information was material to his defense preparation and, in
21 particular, that there was a strong indication that it will
22 play an important role in uncovering admissible evidence,
23 aiding in witness preparation, corroborating testimony, or
24 assisting impeachment or rebuttal, and in so doing he was
25 quoting from Judge Kaplan's decision in *United States v. Stein*,

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1 488 F. Supp. 2d 350, from 2007.

2 The government opposed the motion and argued that
3 Mr. Storm had not made a *prima facie* showing of materiality,
4 and instead argued that these requests amounted to "a
5 speculative fishing expedition." Their words, not mine.

6 So, looking first at the applicable law, I'm aware,
7 and I know the parties are aware, so I might proceed somewhat
8 summarily here, that pretrial discovery is governed by Rule 16
9 of the Federal Rules of Criminal Procedure, which provides, in
10 pertinent part, that a defendant is entitled to obtain from the
11 government documents and objects that are "within the
12 government's possession, custody, or control" if they are
13 either "material to preparing the defense" or will be used by
14 the government in its case in chief at trial.

15 And what makes something material is if it could be
16 used to counter the government's case or to bolster a defense.
17 And the Second Circuit and other courts have found that
18 information not meeting either of those criteria is not to be
19 deemed material. This would include cases such as *United*
20 *States v. Stevens*, 985 F.2d 1175, from 1993, and *United*
21 *States v. Scully*, which is an Eastern District decision from
22 2015, discussing this, 108 F. Supp. 3d 59.

23 The courts are directed to consider "the logical
24 relationship between the information and the issues in the
25 case" and "the importance of the information in light of the

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1 evidence as a whole." "There must be some indication that the
2 pretrial disclosure of the disputed evidence would ... enable
3 [] the defendant significantly to alter the quantum of proof in
4 his favor." And I am quoting here from *United*
5 *States v. Maniktala*, 934 F.2d 25, a Second Circuit decision
6 from 1991. And in this setting, it is "a defendant who bears
7 the burden of making a *prima facie* showing that the information
8 sought is material."

9 There are many cases for this proposition. One recent
10 one is Judge Cronan's decision in *United States v. Alexandre*,
11 at 2023 WL 416405, and the *United State v. Rigas*,
12 258 F. Supp. 2d 299, a Southern District decision from 2003.

13 Separately, there is the line of cases, including
14 *Brady* and others, that establishes "the government has an
15 affirmative duty under the Due Process Clause to disclose
16 favorable evidence known to it, even if no specific disclosure
17 request is made by the defense." Cases discussing the *Brady*
18 and *Giglio* obligations of the government include *United*
19 *States v. Hunter*, 32 F.4th 22, a Second Circuit decision from
20 2022.

21 These cases also make clear, however, that "there is
22 no general constitutional right to discovery in a criminal
23 case," that *Brady* did not create such a right, and that
24 "Rule 16 does not entitle a criminal defendant to a broad and
25 blind fishing expedition among items possessed by the

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1 government on the chance that something impeaching might turn
2 up." I've been quoting from two cases here, the first is
3 *Weatherford v. Bursey*, 429 U.S. 545 from 1977, and the second
4 is the *Scully* case I mentioned earlier.

5 Let me now turn to my analysis of this motion. And as
6 I suggested in my questioning at oral argument, I find now, and
7 I found then, Mr. Storm's arguments to compel production of the
8 MLAT communication, and that's where I'm beginning, to be too
9 speculative and too attenuated to satisfy his burden of showing
10 materiality.

11 Even under Judge Kaplan's *Stein* standard, Mr. Storm
12 has not demonstrated a "strong indication" that the information
13 he seeks would aid defense. And that is because, in the papers
14 I read and in the discussions at oral argument, everything was
15 couched in terms of "may": Disclosure of these communications
16 may provide insight into the government's theories of the case,
17 particularly if they have changed; they may particularize the
18 evidence the government intends to use at trial; they may give
19 insights into other complicit parties, or parties the
20 government thought were complicit earlier on; they may help the
21 defense identify percipient witnesses for trial. But Mr. Storm
22 has not succeeded in connecting the dots and explaining
23 precisely how the communications sought would aid the defense.
24 And that's insufficient under the law that I've just listed.

25 Of course, the defense argues that, because it does

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1 not know the precise content of the requested materials, it
2 must couch what it understands are in the requested materials
3 and communications with terms like "could" and "may." While
4 that may be understandable, it is still insufficient. There
5 must be some showing that the MLAT communications are, in fact,
6 and not just in theory, material to the defense. Instead, at
7 oral argument, Mr. Klein recalled that, as a former prosecutor,
8 he had observed "MLAT requests and communications, again, can
9 often involve substantive facts about the case" or exhibits.
10 And I'm quoting from the transcript at page six.

11 I, too, am a former prosecutor, but my experiences,
12 which, as it happened, never resulted in a request for, much
13 less a disclosure of, MLAT communications, it just can't be the
14 basis for me to make a finding that such communications would
15 be material to the defense.

16 Mr. Klein also sought to analogize the MLAT
17 communications to search warrant applications, which are
18 typically disclosed. But, as the government noted, those
19 materials do not implicate comparable "diplomatic
20 sensitivities." And ultimately, upon looking at the little bit
21 of case law in this area, I agree with the conclusion that
22 Judge Furman reached in the *Ralston* case, *United*
23 *States v. Ralston*, 2021 WL 5054464 from 2021, that he rejected
24 a motion to compel MLAT communications after reviewing the
25 materials. Another case in which the motion was denied was

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1 *United States v. Hutchins*, 2018 WL 1695499, from the Eastern
2 District of Wisconsin.

3 Now, to be clear, I'm aware that there are some
4 factual differences. In Judge Furman's case, for example, the
5 materials there were sought in order to prove that the
6 government had made a pretextual use of MLATs in order to toll
7 the relevant statute of limitations. That's true, but as it
8 happened, the defendant in the *Ralston* case made a much more
9 detailed, even if ultimately unsuccessful argument, than
10 Mr. Storm makes here.

11 I am also aware that Judge Furman reviewed the MLAT
12 materials *in camera* before arriving at his decision. In that
13 case, of course, the argument had been that they had been
14 pretextual and the government had consented to their
15 inspection. There's no comparable consent or showing in this
16 case. And as I'll discuss shortly, I am not going to review
17 these materials *in camera* simply because I've been asked to do
18 so. And in part, that is because, as Mr. Klein confirmed at
19 oral argument, the defense was not, at this time, raising an
20 argument of government misconduct, the likes of which might be
21 discussed in cases like *Kyles v. Whitley*, 514 U.S. 419, from
22 1995.

23 I also do see that the *Hutchins* Court noted that the
24 government had produced all of the information it had received
25 from the request at issue. I don't have that exact

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1 representation in this case; I have, instead, the government's
2 representation that it has complied with its Rule 16 and its
3 disclosure obligations.

4 At oral argument, defense counsel also suggested that
5 Mr. Storm had the right to review the MLAT materials in order
6 to see what individuals or arguments were on the government's
7 radar screen when the requests were submitted, and from this,
8 Mr. Storm might learn of potential witnesses or of individuals
9 the government once thought were co-conspirators, or once
10 thought might have been involved in the underlying offense but
11 elected not to charge, but neither of these reasons suffices to
12 compel disclosure. To the extent the defense is moving for
13 disclosure of other co-conspirators or government informants,
14 there is a different vehicle, and that would be a motion under
15 *Roviaro v. United States*, 353 U.S. 53, from 1957.

16 To the extent the government may have abandoned an
17 earlier theory of the case because, as Mr. Klein argued, it is
18 "somehow helpful to" Mr. Storm, that information would be
19 subject to disclosure, if at all, under the government's *Brady*
20 or *Giglio* obligations, it would not necessitate disclosing the
21 underlying communications with the foreign prosecuting office
22 or other state organizations.

23 Mr. Klein also suggested that, because the case "is a
24 novel, complex case of first impression ... understanding the
25 government's theory would be generally helpful to us." I'm

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1 quoting here from the transcript at page 11. But there is, in
2 fact, a 37-page speaking indictment, and defense conceded that
3 things were learned from that indictment and from the briefing
4 in this case.

5 As a fallback position, Mr. Storm asks this Court to
6 conduct an *in camera* review of the MLAT communications, and I
7 am denying this request as well. I want to be clear, and some
8 of you know this, that I come from the appellate side of the
9 house, and I will frequently extend myself to do things that
10 aren't technically required under the law simply to stave off
11 an appellate issue. I'm not doing that here, however, because
12 I believe it would set a bad precedent. To conduct an *in*
13 *camera* investigation of the communications with the Dutch
14 authority, for example, on this slender a record would
15 effectively call for *in camera* reviews in all cases or nearly
16 all cases. The defense hasn't met its burden, and I'm not
17 interested in being a data point for some later motion for an
18 *in camera* inspection on a similarly sparse record.

19 Now, there is a second prong of the motion to compel.
20 And here, Mr. Storm is seeking to compel the government to
21 produce all communications with OFAC and FinCEN relating to him
22 or to this case more broadly. In his reply submissions and
23 then again in oral arguments, Mr. Storm had narrowed his
24 request to three, asking the Court to, first, have the
25 government confirm that it has produced everything received

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1 from OFAC and FinCEN, and, of course, if it hadn't produced
2 things, to produce the materials that it held back; number two,
3 to confirm that their agents had not had separate contact with
4 OFAC and FinCEN; and number three, to order to OFAC and FinCEN
5 to conduct prudential *Brady* reviews. As the government, at
6 oral argument, confirmed the second point, that is now moot,
7 and this Court is denying the remaining two requests.

8 At oral argument, the government confirmed that it did
9 not produce all materials received from OFAC and FinCEN, but
10 that it did fully comply with its discovery and disclosure
11 obligations. And as with the MLAT communications, there are
12 standards for the production of discovery pursuant to Rule 16,
13 and for the disclosure of information pursuant to cases like
14 *Brady*. There is nothing to suggest that the government wasn't
15 warranted in withholding from disclosing things outside of the
16 bounds of these obligations, and I am therefore not going to
17 compel them to turn over the withheld materials. But as I made
18 clear at oral argument, and as the government is aware from my
19 work in other cases, if it turns out the government ultimately
20 has interpreted its obligations too narrowly, there likely will
21 be unfortunate consequences for their case.

22 This Court is also declining the invitation to issue
23 prudential search requests to OFAC and FinCEN to conduct *Brady*
24 reviews, assuming that, as the government does not but I do
25 here, that I have the jurisdiction to compel such actions in

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1 the first instance.

2 And here, the issue, as the parties are aware,
3 distills to whether either of these agencies qualifies as a
4 part of the prosecution team. Now, the notion of the
5 prosecution team is discussed in cases such as *United*
6 *States v. Avenatti*, 2022 Westlaw 457315, *United*
7 *States v. Avellino*, 136 F.3d 249, a Second Circuit decision
8 from 1998, *United States v. Meregildo*, 920 F. Supp. 2d 434, a
9 Southern District decision, from 2013, and I just looked
10 recently, and it's been discussed by Judge Oetken in *United*
11 *States v. Middendorf*, 2018 WL 3956494, from the Southern
12 District. And the notion there is that "the prosecution's
13 obligation extends to any material in the possession of any
14 entity that has acted as an 'arm of the prosecutor' in a given
15 case." I am quoting from the *Middendorf* decision here. And
16 Judge Oetken set forth order of five primary factors that a
17 Court is to consider, which include "whether the entity
18 participated in the prosecution's witness interviews, was
19 involved in presenting the case to the grand jury, reviewed
20 documents gathered by or shared documents with the prosecution,
21 played a role in the development of prosecutorial strategy, or
22 accompanied the prosecution to court proceedings."

23 Here, I am accepting the government's representation
24 that OFAC and FinCEN did not affect the development of the
25 government's investigative or prosecutorial strategy; did not

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1 assign any employees to the prosecution team as Special
2 Assistant United States Attorneys; were not involved in
3 presenting the case to the grand jury; did not receive grand
4 jury transcripts; have not participated in the execution of
5 search warrants or responsiveness reviews; did not obtain
6 materials produced to the government pursuant to grand jury
7 subpoenas; have not attended government interviews; did not
8 contribute to drafts of the indictment or the prosecution
9 memorandum used to make the criminal charging decision; and
10 have not attended court proceedings in this case." And in
11 consequence, this Court will not order them to review their
12 files for *Brady* or Rule 16 material.

13 Once again, and this was a theme in the motion to
14 compel, Mr. Storm has not made a showing that these files
15 contain exculpatory material. There is, of course, the
16 citation to the 70-page OFAC report, but to reason from this
17 that OFAC may have materials that are *Brady* materials, my
18 concern is that to order OFAC to review its files for such
19 material would be a complete end-run around the prosecution
20 team construct, and this Court will not do it, and therefore
21 that motion to compel production is denied.

22 I now turn to the motion to dismiss. And here,
23 Mr. Storm is seeking dismissal of each of the three charges
24 against him. Because the Count One dismissal arguments are
25 dependent, in part, on the Count Two, that's where the Court is

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1 beginning. So, as to Count Two, which is Conspiracy to Operate
2 an Unlawful Money Transmittal Business, Mr. Storm argues that
3 the indictment fails to allege that he or Tornado Cash had the
4 requisite control to be a money transmitting business, and,
5 additionally, that the indictment fails to allege that he or
6 Tornado Cash charged a fee for the transfer of funds.

7 Turning now to Count One, which was the Conspiracy to
8 Commit Money Laundering, that's what it charges, Mr. Storm
9 argues first that the alleged "financial transactions" do not
10 come within the ambit of Section 1956 because Tornado Cash was
11 not a "financial institution"; second, he argues that he did
12 not conspire or agree with anyone to conduct a financial
13 transaction involving the proceeds of specified unlawful
14 activity; and third, that he lacked the specific intent to
15 further an illegal purpose.

16 As to Count Three, which is the Conspiracy to Violate
17 IEEPA, Mr. Storm argues first that the "informational
18 materials" exception requires dismissal of the count, and
19 separately, that it fails to allege that he willfully conspired
20 to evade sanctions on North Korea.

21 There are also several broader grounds that I'll talk
22 about a little bit later. There are some arguments made under
23 the First Amendment about overbroad or First Amendment
24 violations, and Mr. Storm also argues that the indictment
25 should be dismissed on Due Process grounds, and I'll talk about

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1 that a little bit later.

2 Again, I'll be somewhat summarily in this area. But a
3 defendant can move to dismiss an indictment on the grounds that
4 it is defective Rule 12(b)(3)(B) of the Federal Rules of
5 Criminal Procedure, including for lack of specificity and for
6 failure to state an offense. And because "federal crimes are
7 solely creatures of statute, ... a federal indictment can be
8 challenged on the grounds that it fails to state or fails to
9 allege a crime within the terms of the applicable statute."

10 One case for this proposition, and there are many, is *United*
11 *States v. Aleynikov*, 676 F.3d 71. That said, courts have found
12 that a defendant faces a "high standard" in seeking to dismiss
13 an indictment because Federal Rule of Criminal Procedure 7
14 requires only that the indictment provide "a plain, concise,
15 and definite written statement of the essential facts
16 constituting the offense charged." As a result, courts
17 generally find that "an indictment need 'do little more than
18 track the language of the statute charged and state the time
19 and place, in approximate terms, of the alleged crime.'" I'm
20 quoting here from *United States v. Stringer*, 730 F.3d 120, a
21 Second Circuit decision from 2013.

22 And another case that stated a similar proposition is
23 *United States v. Yannotti*, 541 F.3d 112, a Second Circuit
24 decision from 2008, which indicates that "[a]n indictment is,
25 sufficient when it charges a crime with sufficient precision to

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1 inform the defendant of the charges he must meet and with
2 enough detail that he may plead double jeopardy in a future
3 prosecution based on the same set of events."

4 At the motion to dismiss stage, this Court must
5 "accept as true all of the allegations of the indictment."
6 That's stated in *United States v. Goldberg*, 756 F.2d 949, a
7 Second Circuit decision from 1985. In addition, the Court is
8 not to "look beyond the face of the indictment and draw
9 inferences as to proof to be adduced at trial, for 'the
10 sufficiency of the evidence is not appropriately addressed on a
11 pretrial motion to dismiss[.]'" Here, I'm quoting *United*
12 *States v. Alfonso*, 143 F.3d 772, a Second Circuit decision from
13 1998. In another more recent case, *United State v. Dawkins*,
14 999 F.3d 767, a Second Circuit decision from 2021, the Court
15 finds that summary judgment proceedings "do[] not exist in
16 federal criminal procedure."

17 Now, before I get into the merits of Mr. Storm's
18 argument, I want to echo something that I observed at oral
19 argument, which is that, to the extent that Mr. Storm is asking
20 me to decide a controverted issue of fact, or to insert a
21 clarifying factual allegation into the government's charging
22 language, I'm just not able to do that based on the cases that
23 I've just cited. These factual arguments that have been
24 proffered to me include, as two examples, Mr. Storm's
25 assertions regarding the nature of the Tornado Cash service,

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1 and those concerning the degree to which Tornado Cash's
2 components were "open source" or "immutable."

3 As to the first, the indictment charges that Tornado
4 Cash comprised a website, a user interface, various smart
5 contracts, including those smart contracts that were referred
6 to in the indictment as "Tornado Cash pools," and a network of
7 "relayers" who provided customers with enhanced anonymity in
8 exchange for a fee. Now, as to the second, the indictment
9 alleges that Tornado Cash's three founders controlled the user
10 interface, or UI, and had the ability to make changes to it at
11 their own discretion throughout the charged time period. The
12 government also notes in its opposition that the Tornado Cash
13 UI wasn't announced as open source until July 2022, and argues
14 that even then, such an announcement was largely a public
15 relations move without any real effect.

16 Relatedly, Mr. Storm argues that the Tornado Cash pool
17 smart contracts were "immutable" after May of 2020, but the
18 indictment charges, and the government has argued to me, that
19 other aspects of the Tornado Cash service were not similarly
20 free from tinkering.

21 The point is, at this stage in the case, this Court
22 cannot simply accept Mr. Storm's narrative that he is being
23 prosecuted merely for writing code. For starters, that's an
24 overstatement of what's actually charged in the indictment.
25 What is more, if the jury ultimately accepts his narrative,

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1 then it will acquit, but there is no basis for me to decide, as
2 a matter of law, that the government hasn't alleged criminal
3 conduct sufficient to satisfy each of the elements of the
4 offenses charged. But I will now turn to the legal challenges
5 to each statute.

6 Count Two charges an offense under 1960. And there's
7 a lot of discussion in the parties' submissions about what is a
8 money transmitting business. There are references to it in
9 Section 1960 itself, there are references to it in Section 5530
10 of Title 31 of the United States Code, there are references to
11 a money transmitter or a money services business in the FinCEN
12 implementing regulations, which are set forth at
13 31 C.F.R. 1010.100.

14 And so on this point, I won't get into the minutia of
15 all the various definitions, except to disagree, to the extent
16 that anyone, including Mr. Storm, is arguing that the
17 definitions of "money transmitting" in Sections 1960 and 5330
18 are co-extensive. I do not believe that to be the case.

19 Mr. Storm also reminds me that exempted from the
20 definition of "money transmitter" are individuals who merely
21 provide the delivery communication or network access services
22 used by a money transmitter to support money transmission
23 services.

24 So, getting to the meat of Mr. Storm's argument, he
25 argues that Count Two must be dismissed for two independent

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1 reasons: First, that the statute requires allegations that the
2 defendant in question had control over the funds being accepted
3 or transmitted; and second, the absence of allegations that he
4 or his colleagues charged a fee for transmitting funds.

5 And in support for the first point, Mr. Storm cites
6 various definitions about accepting and transmitting, and also
7 cites the Second Circuit's decision in *United States v.*
8 *Velastegui*, 199 F.3d 590, and *United States v. Bah*,
9 574 F.3d 106. He also cites FinCEN guidance regarding
10 intermediaries who do not qualify as money transmitters. And
11 in his estimation, the use of what is known sometimes in this
12 case as the "secret note," which permitted the Tornado Cash
13 user to access and use the funds, always remained with the
14 user.

15 Here, this Court agrees with the government that
16 control is not a necessary requirement of the Section 1960
17 offense. First of all, and as a threshold matter, I am
18 required to accept at this stage the allegations of the
19 indictment that the charged money transmitting business
20 included the conduct of Tornado Cash's founders and network of
21 relayers, and not merely the pool.

22 But getting back to the issue of control, the control
23 requirement is not in the statute, and this Court is not going
24 to read it in. Section 5330 also employs a broader definition
25 of "engag[ing] as a business in the transmission" of funds, and

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1 that definition includes "any person who engages as a business
2 in an informal money transfer system or any network of people
3 who engage as a business in facilitating the transfer of money
4 domestically or internationally outside of the conventional
5 financial institutions system."

6 And let me turn for a moment to the FinCEN 2019
7 regulatory guidance. Yes, it does speak of control, but it
8 does that in the context of setting forth a four-factor test
9 for determining whether a wallet provider is a money
10 transmitter. The section addressing cryptocurrency mixing
11 services does not similarly require control.

12 At its core, the Section 1960 offense seeks to prevent
13 the unlicensed transmission of customer funds from one location
14 to another, irrespective of whether the transmitter obtained
15 temporary control over the funds to effectuate the transfers or
16 constructed the transfers specifically in a manner to avoid
17 such control. Here, the value-add of Tornado Cash, or in the
18 Tornado Cash system, was that it allowed customers to send
19 cryptocurrency from one wallet to another, without an obvious
20 link between the two wallets, by pooling the customers' funds
21 in an intermediary wallet on the blockchain, and without
22 necessitating direct customer interaction with Ethereum. That
23 is not meaningfully different from the cryptocurrency mixing
24 services recognized as money transmitting businesses in the
25 *United States v. Murgio*, 209 F. Supp. 3d 698, a Southern

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1 District decision from 2016; *United States v. Harmon*,
2 474 F. Supp. 3d 76, a District of the District of Columbia
3 decision from 2020; and *United States v. Sterlingov*,
4 573 F. Supp. 3d 28, a District of the District of Columbia
5 decision from 2021.

6 I do appreciate that Mr. Klein, who I know was
7 involved with some of these cases, disagrees with me and
8 believes that all of those have control, but looking at the
9 actual businesses, I don't find this one to be meaningfully
10 different.

11 I also do agree that to accept Mr. Storm's argument
12 would frustrate the purpose of Section 1960, which was designed
13 to "keep pace with ... evolving threats" as new methods of moving
14 criminal proceeds emerged over time. Quoting here from *United*
15 *States v. Faiella*, 39 F. Supp. 3d 544, from 2014.

16 So, as fallback position, Mr. Storm suggests that
17 Tornado Cash would fall within the exception for network access
18 services. Here, while acknowledging the paucity of case law,
19 this Court agrees with the government that the conduct alleged
20 in the indictment and attributed to Mr. Storm and his
21 co-conspirators goes far beyond the provision of access to a
22 network. The Court also agrees that the phrase itself is best
23 construed as referring to a provider of access to a general
24 network such as the internet, as was discussed in the *WorldCom*
25 decision. That's *In re WorldCom, Inc.*, 371 B.R. 19, a

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1 Bankruptcy decision from 2007.

2 But the Court is also rejecting Mr. Storm's second
3 argument for dismissal, and that is that the government was
4 required to allege that he or his colleagues or Tornado Cash
5 charged a fee for money transmitting services. To be sure, in
6 the *Velastegui* decision that they cite, the Second Circuit
7 referred to "a money transmitting business receiving money from
8 a customer and then, for a fee paid by the customer,
9 transmitting that money to a recipient in a place that the
10 customer designates, usually a foreign country." But to the
11 extent that that description was meant to be definitive, the
12 Second Circuit later clarified, in *United States v. Banki*, a
13 2012 decision reporting at 685 F.3d 99, that "under Second
14 1960, a 'business' is an enterprise that is carried on for
15 profit or financial gain." That was also discussed in *United*
16 *States v. Mazza-Alaluf*, 607 F. Supp. 2d 484, a Southern
17 District decision from 2009, that was then affirmed by the
18 Second Circuit in 2010.

19 As I understand the charges in the indictment, the
20 Tornado Cash enterprise was not an altruistic venture. Among
21 other things, the indictment alleges that Mr. Storm and other
22 Tornado Cash founders solicited approximately \$900,000 in
23 financing from a venture capital fund in exchange for an
24 expectation that the fund would receive a share of future
25 profits from the Tornado Cash service; that they used a bank

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1 account to host the Tornado Cash website and to pay for traffic
2 between the user interface and the Ethereum blockchain; that
3 they designed and promoted the Tornado Cash service's relayer
4 feature, including its structure of charging fees for
5 withdrawals; that they created a formula for capitalizing on
6 relayer fees to boost the value of TORN tokens, the
7 cryptocurrency token they created; and that they cashed out
8 TORN holdings for millions of dollars. To the extent that a
9 fee was required, this Court finds that the fees that were
10 charged and received by the relayer co-conspirators would
11 suffice.

12 So, I turn now to Count One, which is the Money
13 Laundering count and its Concealment Money Laundering count.
14 And I believe the parties are aware of the elements of the
15 offense, so I will skip over them and simply note that they are
16 discussed in cases that include *United States v. Gotti*,
17 459 F.3d 296. And in particular, that deals with the conflict
18 of concealment money laundering.

19 Here, Mr. Storm first argues that Count Two must be
20 dismissed because of the failure to allege a "financial
21 transaction." But for the reasons that I just discussed, the
22 Court finds that the government has adequately charged an
23 unlawful money transmitting business offense under Section
24 1960, the logical extension of that is that Tornado Cash also
25 qualified as a financial institution, and the transactions at

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1 issue also involved the use of a financial institution.

2 The government offers a fallback position, noting that
3 the statutory definition of "financial transaction" contains
4 two alternative definitions; either "a transaction which in any
5 way or degree affects interstate or foreign commerce ... or a
6 transaction involving the use of a financial institution[.]"
7 And they argue that, in paragraph 78 of the indictment, they
8 were charging in the conjunctive.

9 Now, that point may be somewhat academic, giving my
10 resolution of the motion, but on this point, I do find merit in
11 the arguments in the defense's reply brief that, if the
12 government is really seeking to charge an offense under
13 Section 1956(c)(4)(A), the statute contains additional elements
14 that I don't believe are clearly alleged, such as the
15 transaction might involve the movement of funds by wire or
16 involve monetary instruments, or involve the transfer of title
17 to real property, vehicle, vessel, or aircraft. So if the
18 government is really going that route, they might want to clean
19 up confusion in a superseding charging instrument, if that's
20 the track they're pursuing at trial.

21 But Mr. Storm's second argument for dismissal
22 straddles the "financial transaction" and "conspiracy" elements
23 of the offense. He argues that the government was required to
24 allege that he knew the property involved in a particular
25 financial transaction represented the proceeds of an unlawful

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1 activity, and that's an accurate statement of the law. But
2 from this, Mr. Storm reasons that Count One must be dismissed
3 because it does not allege either that Mr. Storm entered into
4 an unlawful agreement with any person who used Tornado Cash
5 smart contracts or the Peppersec UI for illicit purposes; or,
6 number two, that he had the specific intent to commit money
7 laundering; or, number three, that the indictment alleges, or
8 in his case, he said, fails to allege the necessary *mens rea*.
9 Let me unpack these arguments now.

10 The law is clear that, to be guilty of money
11 laundering, the defendant need not be guilty of, involved in,
12 or even aware of the specifics of, the specified unlawful
13 activity. One case for that proposition is *United States v.*
14 *Silver*, 948 F.3d 538, a Second Circuit decision from 2020.
15 Another case in which it's discussed is *United States v.*
16 *Kozeny*, 493 F. Supp. 2d 693, and that's a Southern District
17 decision from 2007, affirmed by the Second Circuit in 2008.

18 "Conspiring to launder money requires that two or more
19 people agree to violate the federal money laundering statute,
20 and that the defendant 'knowingly engaged in the conspiracy
21 with the specific intent to commit the offenses that [are] the
22 objects of the conspiracy.'" I'm quoting from *United States v.*
23 *Garcia*, 587 F.3d 509, a Second Circuit decision from 2009. And
24 "transaction money laundering ... it requires proof that the
25 purpose or intended aim of the transaction was to conceal or

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1 disguise a specified attribute of the funds." I'm quoting here
2 from *United States v. Huevo*, 546 F.3d 174, a Second Circuit
3 decision from 2008.

4 Let me put this more simply. "The government did not
5 have to allege that Mr. Storm conspired with any of Tornado
6 Cash's users to promote or further any of the illicit purposes
7 of their transactions. Indeed, the government did not have to
8 allege that Mr. Storm was aware of the specific nature of, much
9 less be a participant in, the underlying criminal activity.
10 Instead, the government needs to prove Mr. Storm needed to know
11 that he was "dealing with the proceeds of some crime, even if
12 he [did] not know precisely which crime." Cases for that
13 proposition include *United States v. Prevezon Holdings Ltd.*,
14 122 F. Supp. 3d 57, a Southern District decision from 2015, and
15 *United States v. Tillman*, 419 F. App'x 110, a Second Circuit
16 summary order from 2011.

17 So, in light of cases like *Prevezon Holdings*, I reject
18 Mr. Storm's argument that "whether or not an express agreement
19 is required, the government must show 'sufficient proof of
20 mutual dependence and assistance' between the perpetrators of
21 the underlying criminal acts and the alleged money laundering
22 conspirators." I'm quoting here from the motion to dismiss
23 briefing at pages 28 through 29. In some cases, "the same bad
24 actors are alleged to have both perpetrated the underlying
25 specified unlawful activity and to have conducted the financial

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1 transactions in which the proceeds of that activity were
2 laundered." It is true that is in some cases, but it is not a
3 requirement. Stated somewhat differently, it is indeed the
4 case that the Venn diagram of the specified unlawful activity
5 and the money laundering conspiracy often involves common
6 conspirators, but it is not necessary, as my restaurant
7 hypothetical at oral argument explained. And a contrary
8 holding would run counter to the decision that I just
9 discussed.

10 I did have a similar conversation with Ms. Axel about
11 this at oral argument, where she argued that in every money
12 laundering conspiracy case that she had seen, the defendant was
13 either a participant in the underlying crime or there was "some
14 connection or interdependence between the group conducting the
15 unlawful activity and the money laundering." I accept that
16 these fact patterns are common, and certainly they would aid
17 the prosecution in proving both the knowledge and the
18 willfulness elements that they are required to prove in the
19 money laundering offense, but I cannot go so far as to say that
20 they are necessary to demonstrate a money laundering
21 conspiracy; they are not, in fact, elements of the money
22 laundering offense, and I will, therefore, not dismiss Count
23 One on this basis.

24 Separately, Mr. Storm made, and I reject, a timeline
25 argument that ascribes significance to the fact that the

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1 development of Tornado Cash preceded the charged dates of the
2 money laundering conspiracy, because, as I understood from my
3 conversations with Mr. Rehn, the government is not alleging
4 that Tornado Cash was specifically developed as the first step
5 in that conspiracy. And I am rejecting the related suggestion
6 that somehow the government is conflating "the agreement to
7 develop the Tornado Cash protocol and UI with a non-existent,
8 later-in-time agreement to engage in purported concealment
9 money laundering." That's from the defense's reply brief at
10 page 15.

11 I also find unavailing the argument that the
12 government did not sufficiently allege *mens rea*. The
13 indictment alleges that Mr. Storm "willfully and knowingly"
14 entered into the conspiracy. I don't get to make a
15 determination of Mr. Storm's intent at this stage; and the
16 government having adequately alleged the requisite intent, the
17 decision regarding the sufficiency of the evidence of that
18 intent is for the jury and not for me. One take for that
19 proposition is Judge Caproni's case in *United States v.*
20 *Percoco*, 2017 WL 6314146, from 2017.

21 Now, throughout his submission, Mr. Storm expresses
22 concern that he is being charged, and would be convicted, on a
23 negligence theory. In this Court's estimation, neither is
24 true. In terms of the offense charged, there are sufficient
25 factual allegations, and representations made in the

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1 government's opposition submission, that, if proven at trial,
2 would allow a jury to find that Mr. Storm acted with the
3 requisite intent.

4 There was also no danger of Mr. Storm being convicted
5 on the basis of negligent acts. The money laundering
6 conspiracy charge that I give, and I have recently given it,
7 specifically requires the government to prove beyond a
8 reasonable doubt that the defendant "knowingly and willfully
9 became a member of the alleged conspiracy." Willfulness is
10 defined as acting "knowingly and purposely, with an intent to
11 do something the law forbids, that is to say, with a bad
12 purpose either to disobey or disregard the law." And I
13 specifically indicate in my charge that the object of the
14 conspiracy cannot be satisfied by negligence. For this reason,
15 I am not going to dismiss Count Two.

16 I will turn now to the defendant's challenges to Count
17 Three. He begins first by arguing that the count should be
18 dismissed because IEEPA's "informational materials" exemption
19 applies to all alleged components of Tornado Cash system. And
20 because I don't believe these facts are in doubt, I'm not going
21 to review the history of the issuance of Executive Order 13466
22 or OFAC's designation of the Lazarus Group hacking organization
23 to the Specially Designated Nationals and Blocked Persons List.

24 Let me turn, instead, to the IEEPA violation, which
25 requires the government to prove, generally speaking, that,

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1 number one, the defendant attempted to violate orders,
2 regulations, or prohibitions issued pursuant to IEEPA relating
3 to North Korea; number two, the defendant attempted to commit
4 the violation or violations willfully; and number three, the
5 defendant did not have a license issued by a part of the United
6 States Treasury Department, known as OFAC, or to engage in the
7 attempted conduct that would have violated the Executive Order
8 or corresponding regulation.

9 I'm aware of the "informational materials" exception.
10 I won't read it into the record. I note as well that there's a
11 bit of a counterweight to that exemption, the software and
12 technology regulation that OFAC has issued. The fact is that
13 the courts in this circuit really have not had occasion to
14 apply the informational materials exemption to the software.
15 Mr. Storm argues that it is well established that the software
16 is speech subject to the First Amendment protections. And in
17 particular, he alleges that the IEEPA conspiracy charge
18 impermissibly seeks criminal sanctions against him for his role
19 in publishing one piece of software, Tornado Cash, on top of
20 another, the Ethereum blockchain, and making it available on
21 the internet. For reasons similar to those outlined earlier in
22 this opinion, this Court rejects the argument. The government
23 argues in the first instance, and the Court accepts, that the
24 software does not constitute informational materials under this
25 section.

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1 Actually, let me back up a moment. That is the
2 government's argument. They may well be right, but I don't
3 think I need to find that finally. The indictment doesn't
4 predicate criminal liability on the mere development of
5 software. To the contrary, Count Three alleges that Mr. Storm
6 conspired with others to knowingly, actively, and profitably
7 cause the Tornado Cash service, the UI, the relayer network,
8 the pools, other smart contracts, and other components of the
9 service, in order to launder funds for the OFAC-designated
10 North Korean Lazarus Group, to then accept deposits from that
11 group's OFAC-sanctioned cryptocurrency wallet, and to process
12 withdrawals of those funds. Mr. Storm is not being charged
13 with exporting Tornado Cash software, but with laundering funds
14 using the Tornado Cash service, which definitionally extends
15 beyond the software.

16 Once again, Mr. Storm challenges the indictment's
17 allegations concerning his *mens rea* on this count as well, and
18 these challenges also fail. To begin, he is charged with
19 entering into the conspiracy knowingly and willfully, which
20 tracks the requisite statutory language. The government has
21 also alleged facts that, if accepted by the jury, suffice to
22 demonstrate his awareness of the specific sanctions he was
23 violating. And here, as before, a motion to dismiss the
24 indictment is an inappropriate procedural vehicle for testing
25 the strength of the government's evidence regarding intent. So

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1 for all of these reasons, I am not going to be dismissing those
2 counts on those bases.

3 But there are some broader arguments that I do want to
4 take a moment to discuss. I really do thank the parties for
5 the analyses and these arguments. I found them fascinating.
6 Let me spend a few moments on them.

7 Mr. Storm argues that all three statutes are overbroad
8 in the violation of the First Amendment because they
9 criminalize the writing and dissemination of computer code, as
10 well as the maintenance of a website publishing such a code.
11 And the First Amendment overbreadth doctrine, speaking
12 generally, requires the Court hold facially unconstitutional
13 statutes that punish too much protected speech despite lawful
14 applications, because such "overbroad laws 'may deter or
15 'chill' constitutionally protected speech." I'm quoting here
16 from the Supreme Court's decision in *United States v. Hansen*,
17 599 U.S. 762 from 2023. And there are many cases that it
18 addresses and that deal with similar things.

19 The challenger, the person offering a First Amendment
20 challenge, must demonstrate that the statute "prohibits a
21 substantial amount of protected speech" relative to its
22 "plainly legitimate sweep." Again, I quote from the *Hansen*
23 decision. The challenger bears the burden of demonstrating,
24 from the text of the law and from actual fact, that substantial
25 overbreadth exists. Quoting here from *New York State Club*

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1 *Association v. City of New York*, 487 U.S. 1, from 1988.

2 An overbreadth challenge is less likely to succeed
3 where Congress intended to use terms of art in order to
4 prescribe only a narrow band of speech, as opposed to the terms
5 used in every day conversation, which would encompass a broader
6 swath of speech. Courts here are to consider not only conduct
7 clearly prohibited by the statute, but also conduct that
8 arguably falls within its ambiguous sweep. That said,
9 ordinarily, overbreadth challenges to laws that do not target
10 speech or expressive activity do not succeed.

11 The first step in deciding whether any statute is
12 overbroad is to determine what conduct the statute covers.
13 That was discussed in the *Hansen* case I mentioned earlier.
14 Here, in relevant part, the statutes and regulations that
15 support the three counts prescribe the conducting of a
16 financial transaction to conceal the proceeds of unlawful
17 activity, the operation of an unlicensed money transmitting
18 business, and the receipt of funds from a sanctioned entity
19 without obtaining OFAC's approval. Mr. Storm contends that
20 these provisions in fact criminalize and chill the legitimate
21 expressive activity of publishing computer code that itself
22 supports a constitutionally protected interest, to which
23 privacy over financial transaction, where specifically
24 Mr. Storm contends that Counts One and Two punish the mere
25 writing and/or dissemination of the code for smart contracts as

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1 a conspiracy to commit money laundering by defining the terms
2 "conducting" and "transmission" to include this writing or
3 dissemination. I am focusing here on pages 47 and 48 of the
4 opening brief.

5 Mr. Storm also contends that Count Three punishes, as
6 sanctions evasion, the mere retaining of the website providing
7 the public information to access the Tornado Cash smart
8 contracts. I disagree with each of those propositions.

9 Mr. Storm has shown neither a substantial overbreadth, nor the
10 potential for it, based on the laws of purportedly ambiguous
11 sweep, and that is because these laws do not target protective
12 expressive conduct. They do not punish coding, QUA coding, or
13 website maintenance, QUA website maintenance; they punish money
14 laundering, they punish the operation of an unlicensed money
15 transmitting business, and they punish sanctions evasion.

16 That Mr. Storm's charged conduct includes the writing
17 and dissemination of codes and the maintenance of a public
18 website is insufficient to turn these into some sort of
19 overbreadth challenge. And to the extent that these laws could
20 be applied unconstitutionally, Mr. Storm has failed to show
21 that such instances are disproportionate to their lawful sweep.

22 And lastly, the implication of certain privacy
23 interests does not make these statutes overbroad. Constraining
24 statutes to criminalize the alleged conduct would not chill the
25 legitimate expressive activity of publishing computer codes

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1 supporting a constitutionally protected interest in privacy
2 over financial transactions. Quite to the contrary, the
3 implication of these interests is of little relevance to the
4 Court's overbreadth analysis. And for this reason, the
5 overbreadth challenge fails.

6 Now, Mr. Storm also mounts an as-applied challenge,
7 claiming that the statutes violate the First Amendment as
8 applied to his conduct. Here, the threshold issue is, of
9 course, whether Mr. Storm's conduct amounts to protected speech
10 at all, because nonspeech conduct does not merit First
11 Amendment protection. There's one case that it propositions,
12 *CFTC v. Vartuli*, 228 F.3d 94, a Second Circuit decision from
13 2000.

14 It is true that computer coding can be expressive
15 conduct protected by the Frist Amendment. One case for that
16 proposition is *Universal City Studios, Inc. v. Corley*,
17 273 F.3d 429, a Second Circuit decision from 2001.

18 But when a programmer is using a code to direct a
19 computer to perform various functions, that code is not
20 protected speech. Another Court noted the interaction between
21 programming commands as triggers and semiconductors as a
22 conduit, even though communication is not speech within the
23 meaning of the First Amendment, and the communication between
24 the program and a customer using it as intended was similarly
25 not speech. The functional capability of code is not speech

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1 within the meaning of the First Amendment.

2 Here, the conduct charged in the indictment includes
3 the functional capability of code, which does not implicate the
4 First Amendment. To the extent that the indictment alleges
5 that Mr. Storm used computer code, it was to design a program
6 that furthered money laundering and sanctions evasion scheme.
7 The use of computer coding or software to achieve these ends is
8 far from the expressive sort of coding that would merit First
9 Amendment protection. And although the Court finds that
10 Mr. Storm's conduct does not implicate the First Amendment,
11 even assuming that it did, the Court finds that the application
12 of these laws to Mr. Storm's conduct satisfies intermediate
13 scrutiny.

14 Mr. Storm contends that the application of these
15 statutes to his conduct is a content-based restriction on his
16 freedom of speech. More specifically, he argues that the
17 statutes underlying the charges target the function of his
18 supposed speech conduct; namely, computer code designed to
19 improve the privacy of personal financial transactions, which
20 is a constitutionally protected interest. He also argues that
21 the indictment takes the position that there is no legitimate
22 purpose for maintaining privacy over one's financial
23 transactions on an otherwise completely transparent and
24 publically viewable blockchain. These arguments are made in
25 the opening brief at pages 49 and 50 and in the reply brief at

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1 27 and 28.

2 The Court disagrees with the arguments. The reference
3 as to privacy in the indictment amount to allegations that
4 Mr. Storm had the requisite state of mind, not indications that
5 the government aims to punish the expression of a generalized
6 belief in promoting privacy. I'm looking, in particular, at
7 paragraphs 11, 21, and 35 of the indictment; I believe there
8 are others that fall within this category.

9 Any restrictions of Mr. Storm's speech are content
10 neutral, and this Court, therefore, need not address the
11 argument that such restrictions fail strict scrutiny. "A
12 content-neutral restriction is permissible if it serves a
13 substantial governmental interest, the interest is unrelated to
14 the expression of free expression, and the regulation is
15 narrowly tailored ... meaning it does not 'burden substantially
16 more speech than is necessary to further the government's
17 legitimate interests.'" I'm quoting here from *Corley*. I
18 realize that this is something the government bears the burden
19 on, as noted by the Second Circuit in *Cornelio v. Connecticut*,
20 32 F.4th 160, a 2022 decision.

21 The defense argued that the government has failed to
22 meet this burden, but the Court finds that the government has.
23 The government has a substantial interest in promoting a secure
24 financial system by combating money laundering, by combating
25 the operation of unregistered money transmitting services, and

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1 by combating the evasion of sanctions. These interests are
2 wholly unrelated to the suppression of free expression, and the
3 applicability of these laws to Mr. Storm's conduct does not
4 burden substantially more speech than necessary to further the
5 government's substantial interest, because the charged conduct
6 implicates the functional, rather than the expressive features,
7 of computer coding and software. Accordingly, these laws, as
8 applied to Mr. Storm's conduct, satisfy intermediate scrutiny
9 to the extent that Mr. Storm's conduct implicates the First
10 Amendment.

11 Moving on, Mr. Storm also argues that the statutes are
12 void for vagueness, both facially and as applied to his
13 conduct. This Court disagrees. "The void-for-vagueness
14 doctrine requires that a penal statute define the criminal
15 offense with sufficient definiteness that ordinary people can
16 understand what conduct is prohibited and in a manner that does
17 not encourage arbitrary and discriminatory enforcement." I'm
18 quoting here from *Copeland v. Vance*, 893 F.3d 101, a Second
19 Circuit decision from 2018. Challengers can raise an
20 as-applied challenge or a facial challenge to a criminal
21 statute. There are different standards to both, but all
22 vagueness challenges, whether facial or as-applied, require the
23 Court to answer two separate questions: Whether the statute
24 gives adequate notice, and whether it creates a threat of
25 arbitrary enforcement. Indeed, Courts should proceed with

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1 caution when evaluating vagueness challenges and should examine
2 the challenger's conduct before analyzing other hypothetical
3 applications of the law. This is discussed in cases including
4 *Expression Hair Design v. Schneiderman*, 581 U.S. 37, from 2017.

5 The Second Circuit in *United States v. Houtar*,
6 980 F.3d 268, in 2020, also instructed lower courts to presume
7 that acts of Congress are not unconstitutionally vague. So
8 although Mr. Storm conflates the reasons supporting his facial
9 challenge with those supporting his as-applied challenge, at
10 bottom, what he is arguing is that all three statutes
11 criminalize the publication of any software that may later be
12 misused by a third party, even where the author of such code is
13 not involved in or even aware of such misuse.

14 He contends that the statutory definitions of
15 "financial transaction" in Section 1956, "accepting and
16 transmitting" in Section 1960, and "informational materials" in
17 Section 1702(b)(3) are all facially vague. He also argued that
18 these statutes invite arbitrary enforcement because there are
19 no explicit standards for their application to those
20 disseminating code and maintaining websites. Moreover, he
21 claims that it is unclear whether the statutes extend only to
22 the writing and dissemination of the code over which the author
23 contains control or whether they extend to immutable code,
24 subjecting the author to criminal liability for third parties'
25 misuse.

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1 In this case, the Court finds that the statutes at
2 issue gave Mr. Storm adequate notice that his conduct was
3 criminal and created no threat of arbitrary enforcement. I
4 will point, as adequate notice, the indictment alleged that he
5 knowingly marketed Tornado Cash as a means of allowing
6 customers to conceal the nature and source of their unlawful
7 activity, he had adequate notice that this conduct was
8 prescribed by Section 1956. He also had adequate notice that
9 his conduct was prescribed by Section 1960. Because although
10 Tornado Cash is not a traditional money transmitting outfit,
11 its business fits the plain definition of money transmitting
12 such that he had adequate notice that the charged conduct was
13 criminally prescribed.

14 Finally, the indictment alleges that Mr. Storm was
15 aware that stolen funds from an OFAC-sanctioned entity were
16 laundered through Tornado Cash and continued to facilitate
17 these transactions. Once again, the statutes afforded him
18 adequate notice that his conduct was criminal, despite that
19 fact that he may have used nontraditional technology to do so.

20 On the issue of arbitrary enforcement, Mr. Storm's
21 narrow focus on the act of disseminating code and whether the
22 statutes might extend to immutable code confuses the issue.
23 The question in a facial challenge is whether the statute is so
24 fatally indefinite that it cannot constitutionally be applied
25 to anyone. And I'm quoting here from the *Copeland* decision.

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1 That the statutes do not distinguish between mutable and
2 immutable code, or do not directly address computer coding, is
3 insufficient to show fatal indefiniteness, because these are
4 merely the means that Mr. Storm and his colleagues allegedly
5 used to achieve the ends of a conspiracy to launder money, to
6 operate an unregistered money transmitting business, and to
7 evade sanctions, all of which are clearly prescribed by the
8 statute. Not only can these statutes be applied to the conduct
9 of others, but they can also be applied to Mr. Storm's conduct.
10 His facial vagueness challenge, therefore, falls.

11 In the end, his arguments fail not in due process
12 violation, but in the weight of the evidence as to his state of
13 mind, which, as I noted earlier, is a matter for the jury and
14 not this Court.

15 Mr. Storm argues that the counts should be dismissed
16 pursuant to the rule of lenity because the indictment alleges a
17 novel and expansive interpretation of the statutes underlying
18 the conspiracy charges, and expanding criminal liability to the
19 alleged conduct would involve a sweeping expansion of federal
20 criminal jurisdiction in the absence of a clear statement of
21 Congress. I am quoting his brief at page 54. The parties are
22 aware of the rule of lenity. It ensures fair warning by so
23 resolving ambiguity in a criminal statute so as to apply it
24 only to conduct clearly covered. I'm quoting here from the
25 Supreme Court's decision in *United States v. Lanier*, 520 U.S.

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1 259. And that means it's a threshold matter. That the
2 challenger invoking the rule of lenity must establish that the
3 criminal statute is ambiguous. And absent this showing where
4 the statutory language is unambiguous, a lenity challenge
5 fails. The Second Circuit found this in the 2021 decision of
6 *United States v. Gu*, 8 F.4th 82.

7 Separately, there is no role for lenity to play if
8 there are two grammatically permissible readings of the statute
9 when viewed in the abstract but only one is consistent with the
10 statute's design. And that is a different Supreme Court
11 decision, *Pulsifer v. United States*, 601 U.S. 24, from 2024.

12 For many of the same reasons that the Court has
13 rejected Mr. Storm's vagueness and First Amendment challenges,
14 it rejects the lenity challenge. The statutes, as construed by
15 the government in the indictment, extend to Mr. Storm's alleged
16 conduct. He has not made a threshold showing of statutory
17 ambiguity, and there is, therefore, nothing for lenity to
18 resolve.

19 The final argument being made is that the counts
20 should be dismissed as novel constructions. The *Lanier* case I
21 mentioned a moment ago indicates the due process bars courts
22 from applying a novel construction of a criminal statute to
23 conduct that neither the statute nor any prior judicial
24 decision had fairly disclosed to being within its scope. And
25 here, Mr. Storm has said that there's simply no precedent for

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1 the expansive application of the statutes to his conduct. He
2 urges the Court to adopt limited constructions of the statute
3 because, he says, he has found no judicial decisions holding
4 that the constitutionally protected activity of providing code
5 to users who wish to protect their financial privacy can
6 constitute money laundering, operating a money transmitting
7 business, or evading sanctions. But here too, Mr. Storm is
8 confusing the issue. Due process does not require the
9 existence of an analogous prior prosecution.

10 The Second Circuit, in *Ponnapula v. Spitzer*,
11 297 F.3d 172, from 2002, found that due process is not violated
12 simply because the issue is a matter of first impression. A
13 similar result was obtained in *United States v. Ulbricht*, the
14 District Court decision at 31 F. Supp. 3d 540, in 2014. And
15 Mr. Storm has not shown that the alleged conduct is outside of
16 or not within the scope of the statutes in question, as shown
17 in the *Lanier* case. Accordingly, his argument that all counts
18 be dismissed as novel constructions failed, and this Court will
19 not dismiss the three counts in the indictment.

20 I appreciate so much the fact that you've listened to
21 me speak for just over an hour. That is my resolution of the
22 open motions to dismiss and to compel. I will issue a
23 bottom-line order that simply notes that they have been
24 resolved.

25 I am aware that in the last 24 hours there was an

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1 opposition submission from Mr. Storm the government's request
2 for the disclosure of information about an advice of counsel
3 defense and some other things.

4 Mr. Rehn, I don't know that I authorized a reply
5 brief. I'm not sure I got to that point. Is the government
6 intent on replying?

7 MR. REHN: I don't think it is necessary, your Honor.

8 THE COURT: That's fine. Candidly, and this should
9 not shock you, I've been working on this opinion and I haven't
10 really thought about that. I will get to it promptly, and I
11 thank you.

12 From my perspective, I believe that's all that I need
13 to do today. We have a trial date, we have a schedule. Other
14 than this issue about notice, which I will look at when I can,
15 I don't think there's anything else open.

16 Mr. Rehn, from your perspective, is there anything
17 I've omitted doing?

18 MR. REHN: No, your Honor. We're prepared to address
19 the issues raised in our motion filed last week if the Court
20 would like to hear at some future date. It doesn't sound like
21 the Court is ready to hear either of parties.

22 THE COURT: No, no. You can put this on me. This
23 Court is not prepared to deal with that motion at this exact
24 moment in time, having just spoken to you for almost
25 70 minutes, so, no. But I do thank you for being prepared.

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1 Mr. Klein, I'm confident that you're prepared as well.
2 I just want a chance to look at it. And if I need oral
3 argument, I can do what I'm doing right here and just have the
4 parties participate by phone.

5 Mr. Klein, is there anything I've omitted doing this
6 afternoon, sir?

7 SPEAKER2: No, your Honor.

8 THE COURT: I thank you all very much.

9 Again, I appreciate your willingness to remain on the
10 phone, and I really do appreciate the care that you've put into
11 your submissions, which I found really interesting, so thank
12 you for that.

13 I will let you all go. You have my thanks.

14 We are adjourned.

15 (Adjourned)